Petition

81-1978

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CASE NO.

in the

Supreme Court

of the

United States

JACK WAYNE FREEMAN,
MOSES TAYLOR MILLIS,
KEITH ALLEN KEESLING,
CLIFFORD WAYNE BENNETT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Issuance of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Unit B), Now the Eleventh Circuit

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QUESTION PRESENTED

WHETHER THE HOLDING IN *UNITED STATES v. FREEMAN*, WHICH RELIEVES THE GOVERNMENT OF ITS BURDEN TO PROVE THE DEFENDANT GUILTY OF CONSPIRACY BEYOND REASONABLE DOUBT, AND SHIFTS THE BURDEN TO THE DEFENDANT TO PROVE HIS INNOCENCE, VIOLATES THE MOST BASIC FUNDAMENTAL DUE PROCESS RIGHTS, AND DEPRIVES THE DEFENDANT OF A FAIR TRIAL?

PARTIES INVOLVED

The parties involved in this case are:

Jack Wayne Freeman;
Moses Taylor Millis;
Keith Allen Keesling;
Clifford Wayne Bennett; and
The United States of America.

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OPINIONS BELOW

On November 12, 1981, the United States Court of Appeals for the Fifth Circuit, Unit B, rendered its opinion affirming the defendants' convictions. *United States v. Freeman*, 660 F.2d 1030 (5th Cir. 1981). On February 25, 1982, the Court denied the defendants' Petition for Rehearing en Banc. The full texts of the opinion and of the order are included in the Appendix to this Petition (App. 2 and 34).

JURISDICTIONAL STATEMENT

On November 12, 1981, the Fifth Circuit Court of Appeals affirmed the defendants' convictions. On February 25, 1981, the court denied the defendants' Petition for Rehearing en Banc. This Petition is timely filed pursuant to Rule 20.1, Supreme Court Rules.

This Court has jurisdiction to review this case under 28 U.S.C. §1254 and Rules 17.1(a) and 17.1(c), Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED

This case involves a denial of due process as guaranteed under the Fifth Amendment to the United States Constitution.

AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 14, 1979, defendants were arrested on the high seas while on board a vessel that contained a large quantity of marijuana. On December 13, 1979, defendants were tried by a jury in the Middle District of Florida and found guilty of conspiracy to import marijuana. Both before and after the verdicts, defendants filed motions for judgment of acquittal based on insufficient evidence. These motions were denied.

Defendants timely appealed to the Fifth Circuit. On November 12, 1981, the Court filed an opinion affirming the convictions. However, two of the three judges on the panel, Judge Godbold, Chief Judge of the Eleventh Circuit, and Judge Tuttle filed special concurring opinions in which they stated that they did not believe there was sufficient evidence to convict defendants, but were bound to affirm based upon the court's previous holding in *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980). Both judges further stated that it was their opinion that the court should take this case en banc and overrule the decision in *United States v. DeWeese*, and clarify the decision in *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980). The full texts of the *DeWeese* and *Alfrey* opinions have been reproduced in the Appendix to this Petition (App. 36 and 49).

Based on the two special concurring opinions, defendants filed a Suggestion for Rehearing en Banc, which was denied on February 25, 1982.

STATEMENT OF THE FACTS

The following are the relevant facts concerning the issue in this Petition for Writ of Certiorari.

On May 4, 1979, the shrimping vessel "Cowboy" left Tarpon Springs, Florida, to begin a two-week long fishing trip. The captain of the "Cowboy" was indicted co-conspirator, Jay Hilery DeWeese (see, *United States v. DeWeese, infra*). Mr. DeWeese and defendant, Moses Taylor Millis, both flew from Marathon, Florida, to Tampa to meet the "Cowboy". The remaining three defendants were already on the "Cowboy" from a previous shrimping trip.

The record reflects that after the boat left the United States, the captain of the "Cowboy" received a call on his radio suggesting that he consider using the boat for a marijuana transaction. The captain alone decided to change his plans and rather than shrimping, take the "Cowboy" to a location in South America to pick up a load of marijuana.

It was the captain's testimony at trial that the four defendants in this case had no knowledge of his intentions until after the boat started heading to South America. All during the voyage to South America, the crewmembers continued to perform their daily tasks. The captain never consulted with the crewmembers as to whether they were willing to get involved in the transaction. None of the defendants ever agreed.

When the boat arrived at the Serrano Banks, another boat pulled alongside the "Cowboy". Eight men from the other boat proceeded to transfer marijuana from

the other boat to the "Cowboy". After the "Cowboy" was loaded with marijuana, the captain was instructed to take the marijuana to a point off Mexico. When the "Cowboy" arrived in Mexico with the marijuana, the captain of the "Cowboy" was to receive one hundred fifty thousand ($150,000) dollars.

On May 14, 1979, while the "Cowboy" was on its way to Mexico, the Coast Guard Cutter "Point Lobos" approached it in the Yucatan Straits. After approaching the "Cowboy", the Coast Guard Cutter informed the captain of the "Cowboy" that it was going to board the ship to conduct a document and safety inspection.

During the alleged document and safety inspection the marijuana was discovered. Defendants, along with the captain, were arrested and subsequently charged with conspiracy to import marijuana.

REASONS FOR ALLOWANCE OF THE WRIT

THE HOLDING IN *UNITED STATES v. FREEMAN*, WHICH RELIEVES THE GOVERNMENT OF ITS BURDEN TO PROVE THE DEFENDANT GUILTY OF CONSPIRACY BEYOND REASONABLE DOUBT, AND SHIFTS THE BURDEN TO THE DEFENDANT TO PROVE HIS INNOCENCE, VIOLATES THE MOST BASIC FUNDMANETAL DUE PROCESS RIGHTS, AND DEPRIVES THE DEFENDANT OF A FAIR TRIAL.

This Court should review this case based on the fact that the opinion of the Fifth Circuit, in the words of Judge Tuttle, "has placed almost an absolute burden upon a defendant to take the stand to prove the innocence of his presence on a boat." Concurring opinion of Judge Tuttle, 660 F.2d at 1042 (App. 32). This case relies on the holdings in *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980) and *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980), which establish the very dangerous proposition that if a vessel is stopped with marijuana aboard, the presence of the following three factors will make out a prima facie case of conspiracy between the captain and the crewmen to import the marijuana:

1) a long voyage;

2) a large quantity of marijuana on the vessel; and

3) a necessarily close relationship between the captain and the crewmen.

The issue now before this Court is so important that two members of the three-judge appellate panel felt strongly enough about it to write separate opinions concurring only in the result, but suggesting that the precedent they were bound to follow was "unfortunate", "too broad", "wrong" and "inconsistent with our prior jurisprudence concerning the sufficiency of evidence permitting an inference that a defendant has joined in a conspiracy that is going on in his presence and of which he has knowledge". *United States v. Freeman*, concurring opinion of Chief Judge Godbold, 660 F.2d at 1037, 1038 (App. 20). Chief Judge Godbold also wrote that the *DeWeese* case "misreads our decision in *Alfrey*". Id. at 1039.

Judge Tuttle also suggested that the *DeWeese* case sets a dangerous precedent. See Judge Tuttle's concurring opinion at 660 F.2d 1042 (App. 32), wherein he gives an example of a hypothetical situation which surely will shock the judicial conscience:

> Suppose a shrimping boat captain enlisted from the docks of Tarpon Springs a young non-English speaking youth to go with him on a shrimping trip for 10 days; the crewman inspects the vessel and finds it fully equipped for the purpose, with nets, refrigeration, stores, etc. and he signs on. The vessel departs and unknown to the crewman it ends up at the Rosario Banks where it is loaded, without any help by him, with several tons of marijuana. The seaman now has no choice but to continue his crewman's duties, jump overboard or mutiny against a captain and crew of four older men, all of whom may be armed; his sleeping quarters

> are of necessity close to the others as are his other relations.
>
> Such a crewman would have to choose to take the stand and testify to these facts and depend upon the jury to acquit him, or stand helpless once the government had made its proof of length of voyage, quantity of marijuana and closeness of relationship. By specifying the three "factors from which the jury could reasonably find guilt beyond a reasonable doubt" this Court has placed almost an absolute burden upon a defendant to take the stand to prove the innocence of his presence on the boat.

In essence, Chief Judge Godbold and Judge Tuttle reluctantly joined in the decision to affirm, but each wrote specially concurring opinions stating that the evidence was insufficient, but that they were bound by the holding in *DeWeese*, which relied on the opinion in *Alfrey*. Both judges also expressed the opinion that the Fifth Circuit should take the case en banc to overrule the decision in *DeWeese* and clarify the opinion in *Alfrey*. They found that the holdings in *DeWeese* and now this case, to be in direct conflict with the prior jurisprudence of the Fifth Circuit, in that if these cases are allowed to stand, the government no longer will be required to prove that an individual voluntarily entered into a conspiracy, if the government has proven that a conspiracy existed and that the individual had knowledge of the conspiracy.

ARGUMENT

THE HOLDING IN *UNITED STATES v. FREEMAN*, WHICH RELIEVES THE GOVERNMENT OF ITS BURDEN TO PROVE THE DEFENDANT GUILTY OF CONSPIRACY BEYOND REASONABLE DOUBT, AND SHIFTS THE BURDEN TO THE DEFENDANT TO PROVE HIS INNOCENCE, VIOLATES THE MOST BASIC FUNDAMENTAL DUE PROCESS RIGHTS, AND DEPRIVES THE DEFENDANT OF A FAIR TRIAL.

Prior to the holding in *DeWeese*, the Fifth Circuit consistently held that in order to convict an individual of a conspiracy, the government had to prove beyond a reasonable doubt that a conspiracy existed, that the accused knew it, and *with that knowledge, voluntarily joined it. United States v. White*, 569 F.2d 263 (5th Cir. 1978); *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977); *United States v. Gutierrez*, 559 F.2d 1278 (5th Cir. 1977); *Causey v. United States*, 352 F.2d 208 (5th Cir. 1965); *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980); *United States v. Garbin*, 601 F.2d 773 (5th Cir. 1980); *United States v. Littrel*, 547 F.2d 828 (5th Cir. 1978).

In *United States v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979), in an en banc decision, the Fifth Circuit reiterated the elements that the government must prove to establish that an individual is guilty of conspiracy:

> Since knowledge, *actual possession* and criminal intent are the necessary elements of

> the crime of conspiracy the government must, of course, prove each of these elements beyond a reasonable doubt . . .

It is therefore clear that before *DeWeese* and this case, proof of knowledge of a conspiracy without proof that an individual intended to join the conspiracy was insufficient to convict on a conspiracy charge.

An analysis of the "three factors test" established in the *DeWeese* case reveals that an individual can now be convicted of conspiracy even if he did not intend to be a member of that conspiracy. As Chief Judge Godbold and Judge Tuttle so aptly pointed out in their concurring opinions, one can imagine numerous situations in which a crewmember can be on a vessel on a long voyage, with marijuana on board and he can have a close relationship with the captain, but yet not intend to become a member of a conspiracy.

To demonstrate the absurd ramifications of the majority opinion, Chief Judge Godbold wrote at 660 F.2d 1038:

> Until DeWeese is corrected every officer and every crewman on every fishing and shrimping boat that makes a "long voyage" (here ten days) in the Gulf or Atlantic is now prima facie a conspirator if a large quantity of contraband is found aboard the vessel. The same will be true of all officers and crew on recreation and pleasure craft.

Prior to *DeWeese* and now this case, the Fifth Circuit consistently required that the government show

more than mere presence and knowledge *before* in order to convict an individual of conspiracy. See, *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1978); *United States v. Duchett*, 550 F.2d 1027 (5th Cir. 1977); and *United States v. Sanchez*, 508 F.2d 388 (5th Cir. 1975).

In Chief Judge Godbold's concurring opinion, he lists numerous kinds of evidence which the government can introduce to establish that a defendant not only knew about the conspiracy to import marijuana but also intended to become a member of that conspiracy.

If this Court fails to review the decision in this case and the decision in the *DeWeese* case, the government will no longer be required to prove all the elements necessary to establish a conspiracy in the Fifth and Eleventh Circuit Courts of Appeal.

The opinion in *DeWeese* and this case both rely on the case of *United States v. Alfrey* to support the position that the "three factor test" is sufficient to establish a prima facie case of conspiracy to import. Once again, as Chief Judge Godbold and Judge Tuttle aptly pointed out in their concurring opinions; the facts in *Alfrey* are clearly distinguishable from the facts in *DeWeese* and the facts in this case.

In *Alfrey*, the court relied on more than the mere circumstances that (1) the crewmembers were on board a vessel that contained a large quantity of marijuana; (2) the vessel was on a long voyage; and (3) the crewmembers had a close relationship to the captain.

The *Alfrey* panel went to great lengths to emphasize that the crewmembers, having been on the boat when

it left Colombia and the suspicious behavior of the vessel the night before the arrest, were crucial factors showing that the crewmembers in that case intended to become a part of the conspiracy. See, *Alfrey*, 620 F.2d at 555.

If this Court allows the three factors test of *De Weese* to remain good law, the government will no longer be required to prove the things that were required in the *Alfrey* opinion, to-wit: other evidence demonstrating that a crewmember intended to become a part of the conspiracy.

It is, therefore, apparent that the holding in *De Weese* and the possible interpretation of the holding in *Alfrey* is in such conflict with all the prior jurisprudence of the Fifth and now Eleventh Circuits that it is appropriate and necessary for this Court to review this case on certiorari and overrule *De Weese* and clarify *Alfrey*.

It is also apparent as Chief Judge Godbold and Judge Tuttle stated in their concurring opinions, that if this Court does in fact overrule *De Weese* and clarify *Alfrey*, then under the prior case law of the Fifth Circuit, the convictions of the defendants must be reversed due to insufficient evidence.

CONCLUSION

In recent years, in a well-intentioned effort to "stem the tide" of drug importation into, and drug trafficking within the United States, by insuring that defendants in drug cases are brought to justice, the Fifth and now the Eleventh Circuit Courts of Appeal have been chipping away at the traditional constitutional guarantees that are the cornerstone of our criminal justice system.

This time, the court has gone too far. It has taken the government's burden of proof; the beyond a reasonable doubt standard; and the presumption of innocence and turned them on their heads. By the opinion in this case, the law of the Fifth and now the Eleventh Circuits is that the government need not prove a defendant guilty of conspiracy; rather, the burden has been shifted onto the defendant to prove himself innocent.

If allowed to stand, this will constitute the deepest intrusion on defendants' rights that it will be this country's misfortune to have encountered in recent years—perhaps in all time since the nation was founded.

Since the "three factor test" that derives from the holdings in *United States v. Alfrey, supra, United States v. DeWeese, supra,* and now this case, allows a crewmember to be convicted of a conspiracy without proof of intent to join the conspiracy, this Court should

grant this Petition for Writ of Certiorari, clarify the decision in *Alfrey*, overrule the decision in *DeWeese* and reverse the decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition has been furnished by United States Mail to the Office of the United States Attorney, Attention: Stephen S. Cowen, Esquire, Assistant United States Attorney, 500 Zack Street, Room 410, Tampa, Florida 33601; and to the United States Solicitor General, Department of Justice, Washington, D.C. 20530; on this 23rd day of April, 1982.

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Appendix

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Jack Wayne FREEMAN, Moses Taylor Millis, Keith Allen Keesling, and Clifford Wayne Bennett,
Defendants-Appellants.

No. 80-5074.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 12, 1981.

Defendants were convicted in the United States District Court for the Middle District of Florida, M. Terrell Hodges, J., of conspiracy to import marijuana and they appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) search of vessel was reasonable; (2) defendants had no expectation of privacy in fish hold or ice hold in the vessel; (3) evidence was sufficient to show that the vessel was heading for the United States; (4) evidence was sufficient to sustain defendant's convictions for conspiracy; and (5) prosecutor's rebuttal argument was not improper comment on defendant's failure to testify.

Affirmed.

Godbold, Chief Judge, filed a specially concurring opinion.

Tuttle, Circuit Judge, filed a special concurring opinion.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Milton E. Grusmark, Miami, Fla. for defendants-appellants.

Stephen L. Cowen, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, and TUTTLE and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge.

A jury found beyond a reasonable doubt that appellants Jack Wayne Freeman, Moses Taylor Millis, Keith Allen Keesling, and Clifford Wayne Bennett engaged in a conspiracy to import approximately 41,000 pounds of marijuana into the United States 21 U.S.C. §§ 952(a) and 963. The appellants were crew members on the COWBOY, a large shrimping boat. The COWBOY's captain, Jay Hilery DeWeese, was separately tried and his conviction has been affirmed. *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981).

Appellants' arguments fall into essentially three categories. First, they argue that the Coast Guard's boarding and subsequent search of the vessel were conducted in violation of the fourth amendment. Second, they contend that the evidence was insufficient to convict them of importing marijuana into the United States. Third, they urge that harmful error occurred in the conduct of the trial. For the reasons set out below, we affirm the appellants' convictions.

I. *The Travels and Tale of the COWBOY*

At dawn on May 14, 1979, the Coast Guard cutter POINT LOBOS observed an unidentified vessel on its radar, approximately nine miles away. The Commanding Officer of the POINT LOBOS proceeded to investigate the vessel, noting as he approached that the vessel was on a heading of 290 to 300 degrees, or northwest. When the POINT LOBOS was three miles away from the subject vessel, the vessel changed course, resulting in a heading of 340 degrees, or north-northwest. As the POINT LOBOS continued its approach, her commanding officer identified the subject vessel as a large shrimp boat and observed the name COWBOY and the home port "Mobile" painted on the stern of the vessel. He further observed that the COWBOY was not engaged in shrimping, as all of its fishing nets were on deck.

The POINT LOBOS closed to twenty-five yards and requested over the loudspeaker that the COWBOY stop for a boarding. A three-man party from the POINT LOBOS boarded the COWBOY. On board the COWBOY, Coast Guard Petty Officer Helms asked who was master and Jay Hilery DeWeese replied that he was captain. In response to Mr. Helms' request, DeWeese accompanied Mr. Helms to the pilot house and produced documentation papers showing that the COWBOY was a registered American vessel that cost $400,000 that had been launched in March, 1979, from Mobile, Alabama.

At the time of boarding, none of the COWBOY's shrimp nets were in the water. Mr. Helms also observed during inspection that the shrimping vessel was very clean. There were no shrimp nets attached to the COWBOY's extension booms. The boards used for

dragging the shrimp nets were resting on deck. The metal strips covering the edges of the boards were rusty. This rust indicated that no shrimping had occurred because recent dragging on the sandy ocean floor would have polished the strips through a sandpaper effect. Based on what he observed concerning the COWBOY's shrimping gear, and based on his own experience with shrimping vessels, Mr. Helms concluded that the COWBOY had not been shrimping. When the COWBOY was taken back to port neither shrimp nor ice in quantities sufficient for shrimping was found.

After inspecting the COWBOY's documents and engine room, Mr. Helms asked DeWeese if he could take a look in the COWBOY's ice hold. Shrimp are usually stored in a shrimping vessel's ice hold. DeWeese responded, "Sure, but you're not going to like what you find." When DeWeese and appellant Keesling opened the hatch, Mr. Helms saw bales of what he believed to be marijuana and smelled the odor of marijuana. The appellants and DeWeese were then placed under arrest.

The ice hold contained 503 bales of marijuana weighing 41,750 pounds. The wholesale value of the marijuana was approximately $8,000,000.

DeWeese testified during the government's case-in-chief pursuant to a court order and a grant of use immunity. DeWeese claimed that around May 1, 1979, he was contacted by the owner of the COWBOY and asked if he wanted to take the COWBOY out again. DeWeese agreed and traveled in a friend's private plane from Marathon to Tampa, together with appellant Millis. DeWeese and Millis then proceeded to Tarpon Springs, docked, and they found appellants Keesling,

Bennett, and Freeman already on board. Freeman was the cook. Millis had experience as a captain on other vessels and could assist DeWeese in navigating. Keesling had been on three or four previous trips aboard the COWBOY and acted as engineer. Bennett was the fourth member.

DeWeese gave the following explanation for the thousands of pounds of marijuana aboard the COWBOY. On May 14, 1979, the COWBOY headed toward the Dry Tortugas allegedly to go shrimping. However, during his early morning watch en route to Dry Tortugas, DeWeese claimed to receive an unexpected radio call from an unknown vessel calling itself the BOTIM. This anonymous caller asked DeWeese if he wanted to make some money. DeWeese replied affirmatively. The mysterious caller then instructed DeWeese to travel two hundred miles to the Rosario Banks. There, the voice said, the COWBOY would be loaded with marijuana. DeWeese expressed concern about the risks of the project to his unknown solicitor. The voice replied that the COWBOY would not be taking its cargo back to the United States; hence, the danger of capture would be minimized. DeWeese testified that later that day he told his crew they would be importing marijuana, not shrimping. He claimed to have quelled their fears by saying the vessel would not be entering American waters with the marijuana.

Two days later the COWBOY arrived at Rosario Banks. After anchoring, the unknown caller once again contacted DeWeese and, at long last, identified himself as Raynolds. Raynolds instructed DeWeese to proceed to Serrano Banks, some 200 miles away, off the coast of Nicaragua. Once again, DeWeese testified, the crew

expressed concern and once again he quelled their fears by explaining that the COWBOY would not be entering American waters.

After arriving at Serrano Banks the COWBOY remained anchored for two days. After that period DeWeese was contacted by the BOTIM and Raynolds. A rendezvous was arranged. When the BOTIM arrived DeWeese and Raynolds met alone in the wheelhouse. According to DeWeese, Raynolds told him that he would get $150,000 after delivery of a load of marijuana to a point approximately 13-14 miles off the Mexican coast.

DeWeese testified that while the appellants watched, crew members from the BOTIM loaded the COWBOY with marijuana. After being loaded the COWBOY departed. It was subsequently stopped by the Coast Guard cutter POINT LOBOS in the Straits of Yucatan.

DeWeese also testified that he was an experienced navigator. He claimed that he had never smuggled before. Government counsel confronted DeWeese with a navigational chart found aboard the COWBOY. The chart was devoted solely to the Isle de Providencia, a small island off Nicaragua and near Serrano Banks. DeWeese, however, continued to deny that he had planned in advance to travel to that area.

DeWeese insisted that he never discussed with appellants how they would be paid for their ten days at sea. But he did acknowledge that crew members on a shrimping trip usually are paid based on a share of the catch. DeWeese also testified that throughout the trip he slept four to six hours a day and that each appellant took his regular four hour watch. DeWeese also claimed

that none of the appellants ever refused an order from DeWeese.

DeWeese's testimony was reputed in part by two government experts. Travis Kuykendall, Staff Coordinator for the Mexican and Central American Division of Enforcement for DEA, with six years experience as a DEA agent in Mexico, was qualified as an expert on the drug movement, trends, and economics of drug trafficking in Mexico and Central America. Kuykendall testified that the Isle de Providencia, the island for which the COWBOY carried a detailed navigational chart, is a well-known staging point and resupply area for ships leaving South America with narcotics.

Kuykendall also testified that marijuana is not smuggled into Mexico since Mexico is an exporter of marijuana, supplying the United States with 25-30% of its marijuana. The street value of Mexican marijuana actually sold in Mexico is $50 per pound compared to a street value of $150 to $200 per pound in the States. And Colombian marijuana has a street value of at least $350 per pound in the States.

Kuykendall further testified that the point some 13-14 miles off Mexico's coast which DeWeese claimed to be his destination is actually a major marijuana producing area. Finally, Kuykendall also testified that is his years of experience in monitoring drug traffic he had never heard of Colombian marijuana being smuggled into Mexico.

Commander Howard Gehring of the Coast Guard testified as an expert witness in oceanography and navigation. He based his opinion on the assumption

that a prudent mariner on the high seas in a vessel the size of the COWBOY would make use of navigational charts, ocean currents, the weather, and tides in reaching a destination. Based on an analysis of these factors Gehring concluded that at the time of its seizure the COWBOY's heading indicated that its destination was the United States not Mexico. Furthermore, Gehring's analysis showed that the charts aboard the COWBOY would not allow it safely to enter any ports other than Mobile Bay and several west Florida ports. Finally, the only tidal tables which the COWBOY had on board were two handwritten tables for Tarpon Springs, Florida, one of which showed the times and heights of tides in that port for May, 1979.

The record does not show whether the government anticipated the substance of DeWeese's testimony or whether it was sandbagged. In either event, the jury obviously rejected the thrust of DeWeese's tale for they found the appellants guilty.

II. *The Seizure and Search of the COWBOY*

[1] First, appellants argue that the Coast Guard's boarding and search of the COWBOY pursuant to 14 U.S.C. § 89(a) is unconstitutional in the absence of reasonable suspicion or probable cause that a narcotics violation has occurred. We have held on numerous occasions that the Coast Guard's plenary authority under § 89 "to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and *narcotics violations* to be reasonable within the meaning of the fourth amendment." *United States v. DeWeese*, 632 F.2d 1267, 1269 (5th Cir. 1980); *United States v. Jonas*, 639 F.2d 200, 202 (5th Cir. 1981)

(emphasis added). These inspections may be conducted "in the complete absence of suspicion of criminal activity." *United States v. DeWeese*, 632 F.2d at 1269; *United States v. Williams*, 617 F.2d 1063, 1075 (5th Cir. 1980) (en banc).

[2] Second, appellants argue that Mr. Helms' subsequent search of the ice hold was conducted without probable cause or reasonable suspicion and is therefore violative of the fourth amendment. This issue has already been decided adversely to appellants. We have held on several occasions that neither captain nor crew has a legitimate expectation of privacy protected by the fourth amendment in an area which is subject to the common access of those legitimately aboard the vessel. The ice hold or fish hold, where the Coast Guard has statutory and regulatory authority to search, is such an area. *United States v. Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1270-71 (5th Cir. 1980). Hence, the district court properly refused to grant the appellants' suppression motion.

III. *Jurisdiction and Sufficiency of the Evidence*

A. *Jurisdiction*

[3] Appellants argue that the district court lacked jurisdiction over this case because there was no evidence to establish that either the agreement to conspire or an overt act in furtherance of the conspiracy was committed within the United States. In the context of 21 U.S.C. § 963, we have previously held that "[t]he fact that appellants intended the conspiracy to be consummated within territorial boundaries satisfies jurisdictional requisites." *United States v. DeWeese*,

632 F.2d 1267, 1271, *quoting United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir. 1980). *See United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (Congress intended the crime of attempting to import a controlled substance into the United States, 21 U.S.C. §§ 952(a) and 963, to reach exclusively extra-territorial conduct.).

B. *Destination of the COWBOY*

Appellants assert that the evidence was insufficient to establish that they intended to import marijuana into the United States. The standard of review in a criminal case when the issue is sufficiency of the evidence is whether a reasonable minded jury must necessarily entertain a reasonable doubt as to the defendant's guilt under the evidence. *United States v. Slone*, 601 F.2d 800, 802 (5th Cir. 1979). In evaluating a claim of insufficient evidence according to this standard, we must consider the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), resolving reasonable inferences and credibility choices in support of the jury's verdict, *United States v. Henderson*, 588 F.2d 157, 161 (5th Cir. 1979).

[4] Specifically, appellants argue that DeWeese's testimony that the COWBOY's destination was a point 13-14 miles off the coast of Mexico was not refuted beyond a reasonable doubt by the government's evidence. We disagree.

The government presented two witnesses to show that the COWBOY's destination was the United States. First, Travis Kuykendall, Staff Coordinator for the Mexican and Central American Division of Enforcement

for the DEA, testified that in his experience he had never heard of Colombian marijuana being imported into Mexico. Agent Kuykendall supported his conclusion by a discussion of the economics of marijuana. He explained that a pound of Mexican marijuana sells for $50 in Mexico and $150 in the United States and that Mexico annually exports 2000 to 3000 tons of marijuana to the States. Furthermore, he testified that Colombian marijuana sells for $350 a pound in the United States. Based on the above factors, Kuykendall concluded that there is no market for Colombian marijuana in Mexico.

Second, Commander Howard Gehring of the Coast Guard, who was qualified as an expert in navigation and oceanography, concluded that the COWBOY was en route to a United States port. Gehring's opinion was based on the assumption that a prudent mariner would take advantage of ocean currents, weather, bottom topography, and tides. The COWBOY had maintained two headings: 290 to 300 degrees, or northwest, and 340 degrees, or north-northwest. Gehring found that a vessel maintaining such headings in the Straits of Yucatan was positioned to take advantage of currents which would carry it north to the United States. The COWBOY's headings would not have favored a destination of Mexico, Cuba, or the Bahamas.

Gehring also analyzed the navigational charts discovered aboard the COWBOY. He concluded that only the charts for Mobile Bay, Alabama and the west coast of Florida, primarily Tampa Bay and Tarpon Springs, provided sufficient detail for a safe entry into port. It was noted that the only tidal tables on board the COWBOY were for Tarpon Springs. Gehring stated that the absence of detailed charts for Mexico, Cuba, the Bahamas, or

anywhere outside of Mobile and west coast of Florida, would have prevented the COWBOY from safely entering foreign ports.

Based on the testimony of Agent Kuykendall and Commander Gehring, a reasonable jury could have rejected DeWeese's testimony and concluded beyond a reasonable doubt that the COWBOY's destination was an American port.

C. *Evidence of Conspiracy*

In *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), we relied explicitly on *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980), in holding that

> . . . the probable length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship between the captain and his crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt.

Id. at 1273; *see United States v. Alfrey*, 620 F.2d 551, 556 (5th Cir. 1980).

[5, 6] Here we have (1) the same lengthy voyage (10 days); (2) the same large quantity of marijuana (41,000 pounds); and (3) the same close relationship between captain and crew inferable from the length of the voyage and the size of the vessel. Furthermore, the jury was entitled to consider DeWeese's inculpatory statements about the crew even though they rejected

his exculpatory statements on their behalf. Based on DeWeese's testimony, the jury knew that there was, in fact, a close relationship between captain and crew. Furthermore, DeWeese made clear that the four appellants were well aware of the presence of marijuana aboard the COWBOY. In sum, the three *Alfrey-DeWeese* factors alone would be sufficient to establish a *prima facie* case of conspiracy to import.[1] Here, the inferences to be drawn from those factors were buttressed by DeWeese's testimony.

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[1]In *Alfrey* the court also noted that the appellants had sailed as crew members from Colombia in a marijuana laden vessel and that their vessel engaged in "highly suspicious" maneuvers on the night of its capture. *United States v. Alfrey*, 620 F.2d 551, 555 (5th Cir. 1980). Close analysis shows that these factors are not essential to the court's finding of a conspiracy to import. Presumably, both factors are important because they are circumstantial evidence that the crew was aware that marijuana was aboard the vessel. However, this conclusion can be inferred solely from the three aforementioned *Alfrey-DeWeese* factors. Thus, the factors described on page 555 of the *Alfrey* opinion simply serve to buttress the conclusion on page 556. Furthermore, analogous factors exist in this case. For example, in *Alfrey* the vessel maneuvered suspiciously; here it is highly suspicious that after a ten day voyage there was absolutely no evidence that the COWBOY, a shrimping vessel, had been shrimping. At any rate, it is clear that all aboard the vessel knew that it was loaded with contraband.

My most distinguished colleagues, who concur specially, view *DeWeese* and *Alfrey* as improperly decided, but binding. It is submitted, however, that their apprehensions may not be well founded. Our holding here is not that circumstantial evidence *mandates* a conviction. The evidence is sufficient to authorize the jury to find guilt. Mere presence at the scene of criminal activity is not, alone, sufficient. Yet it is material, highly probative, and not to be discounted. That one confronting most persuasive circumstantial evidence against him might well find it prudent to rebut it is no new concept derived from *DeWeese* or *Alfrey*.

[7] Appellants contend that mere presence and association is insufficient to convict them of conspiracy. The simple response to this argument is that a ten day voyage on a vessel that was bulging with 41,000 pounds of marijuana constitutes much more than "mere presence" or "mere association" as those terms have been used by this court. *See United States v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980) (en banc). We can do no better than to repeat the analysis in *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980):

> Appellant Haight relies on decisions of this court holding that mere presence in an area where drugs are discovered is insufficient evidence to support a conviction for possession. *United States v. Rojas*, 537 F.2d 216 (5th Cir. 1976), *cert. denied*, 429 U.S. 1061, 97 S.Ct. 785, 50 L.Ed.2d 777; *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974). These cases do not aid appellants because more than mere presence has been established in the instant case. In *United States v. Ferg, supra*, we held that evidence that the accused was a passenger in an automobile which had marijuana hidden in it was insufficient to support a criminal conviction. Clearly a member of a three man

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(Footnote 1 Continued)

Neither the law nor the court can *compel* a defendant to testify, but defense counsel well know that evidence in a particular case may make it prudent that he do so. The defendant's choice—to testify, present evidence, or remain silent and rest—is constitutionally protected. The constitution does not prohibit conviction merely because the only hope of avoiding it may be the defendant's testimony.

crew on a long ocean voyage in a small vessel packed with tons of marijuana is different from the passenger in *Ferg* or the person whose fingerprints were found on envelopes containing drugs in *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1978), or the person found crouched by a rock near a house containing marijuana in *United States v. Lopez-Ortiz*, 492 F.2d 109 (5th Cir. 1974). In this case the probable length of the voyage, inferable from the proximity of the border and the documentary evidence, the large quantity of marijuana on board, which made it indisputable that Alfrey and Haight had knowledge of the marijuana, and the necessarily close relationship between the captain of the trawler and his two man crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt.

Id. at 556.

IV. *Appellant's Remaining Arguments*

[8] Appellants argue that the prosecutor impermissibly commented on the appellants' failure to testify thereby violating their fifth amendment right against self incrimination. This contention is based on the following closing arguments.

Defense counsel argued:

> Evidence as opposed to theory. Mr. Cowen's basic theory is that because the defendants didn't conspire to mutiny, that they are guilty. They are not charged with failing to conspire to mutiny.

Now, you do not know, nor does Mr. Cowen whether Jack Freeman is capable of overcoming Hilery DeWeese—I know I couldn't.

You do not know whether Moses Millis or Cliff Bennett or Keith Keesling is capable of overcoming Hilery DeWeese. There is certainly no requirement in the law that they sit and conspire to do that.

You do not know whether the four of them together could conspire to overcome the unknown people who loaded the vessel. And nobody says that didn't take place.

* * * * * *

Did they have to get together to overcome eight unknown South Americans?—Or whatever?

* * * * * *

Did they know how many other men would be there to pick it up?

Jack Freeman said—and the only sentence out of his mouth in this case—as related by DeWeese, is, "I want to get home to my wife and kids." And I'm sure he meant, "I want to get home to my wife and kids alive."

Now, I have no idea what I would do, faced with that situation. I might want to be a hero and attack DeWeese—who at one point locked himself in with a voice on the radio.

I might want to be more concerned about reaching the safety of the Coast Guard and getting home alive—to see my wife and kids.

I don't know what I would do. But that's not the charge in the case. That's a smoke screen. That's an absolute smoke screen, because there's not one word in the indictment that says they are charged with not conspiring to commit mutiny.

Make Mr. Cowen when he stands up again, so that you get an answer—because he is going to stand up again, and I can't answer him. The jury must do it in the jury room—make him show you in the indictment one word that charges them with failure to mutiny. There isn't any.

In rebuttal the prosecution argued:

I suggest to you, ladies and gentlemen, that there is sufficient evidence in this case for you to determine that these defendants participated with Mr. DeWeese in a conspiracy to bring marijuana into the United States. They didn't make it because the Coast Guard caught them. But that was a conspiracy. *And some may have been followers and some may have been leaders, but there is no defense of coercion in this case. You haven't heard any evidence of coercion. No one held a gun to anyone's head—*

MR. GRUSMARK: Object Your Honor. Fifth Amendment.

THE COURT: Well, I'll overrule that objection. It seems to me its responsive.

Go ahead, Mr. Cowen.

MR. COWEN: (Continuing) There's a lot of money to be made smuggling marijuana. These crewmembers wanted to take advantage of that, as did Mr. DeWeese. And the only reason they are sitting here today is, they were caught.

Ladies and gentlemen. I submit to you that based on the evidence before you these men are guilty as charged.

Thank you.

The prosecutor's comments are a comment on the failure to establish a coercion theory. As such, it is proper rebuttal. *See United States v. Becker*, 569 F.2d 951, 965 (5th Cir. 1978); *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977).

Appellants also contend that the government's proof amended the indictment and thus violated the appellants' fifth amendment right to be indicted only by a grand jury. Specifically, the appellants argue that the conspiracy charged in the indictment was limited to the Yucatan Straits whereas the appellants intended to import marijuana into either Marathon or Tarpon Springs, Florida. A simple, straightforward reading of the indictment refutes appellants' argument; hence, we discuss it no further. The appellants' remaining arguments are without merit.

V. *Conclusion*

In sum, we hold that the cases were proved and the convictions are

AFFIRMED.

GODBOLD, Chief Judge, specially concurring:

I concur in the result but only because I am bound by unfortunate language in *U.S. v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), that is the basis for the decision in this case. *DeWeese* was handed down a month and a half after this case was argued. It states, relying on *U.S. v. Alfrey*, F.2d 620 551 (5th Cir. 1980), that if a vessel is caught with marijuana aboard the presence of three factors will make out a prima facie case of conspiracy between captain and crewmen to import: a long voyage, a large quantity of marijuana on the vessel, and a "necessarily close relationship" between captain and crew members.

The *DeWeese* language sweeps too broadly. The third factor, the close relationship between captain and crew, will always be present because captain and crew are necessarily thrown together by arrangements for eating and sleeping and for working a small vessel. Until *DeWeese* is corrected every officer and every crewman on every fishing and shrimping boat that makes a "long voyage" (here ten days) in the Gulf or Atlantic is now prima facie a conspirator if a large quantity of contraband is found aboard the vessel. The same will be true of all officers and crew on recreation and pleasure craft.

DeWeese should be overruled. *Alfrey* should be overruled or clarified so that no other panel will put on it the construction suggested by the majority in this case.

DeWeese is wrong because, first, it is inconsistent with our prior jurisprudence concerning the sufficiency of evidence permitting an inference that a defendant has joined in a conspiracy that is going on in his presence and of which he has knowledge. Second, it misreads *Alfrey*.

Turning first to our prior jurisprudence, under familiar standards we review the evidence in the light most favorable to the government, together with the reasonable inferences that may be drawn therefrom. When the evidence of the defendants' knowing participation in the conspiracy is circumstantial we must decide "whether the jury could reasonably, logically, and legally infer from the evidence presented that [defendants were] guilty beyond a reasonable doubt" (citations omitted), or, put another way, "could the jury reasonably find that the evidence was inconsistent with every hypothese of innocence?" *U.S. v. Littrell*, 574 F.2d 828, 832 (5th Cir. 1978).

In drug conspiracy cases under 21 U.S.C. §963 it is not necessary that an overt act be charged or proved but only that the defendant knowingly participated in the conspiracy. *E.g., Littrell*, at 832. "[M]ere presence, association, acquiescence, or approval without more is not sufficient to establish that a defendant is a member of a conspiracy." *U.S. v. Macker*, 608 F.2d 223, 227 (5th Cir. 1979). "[T]here must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew it and, with that knowledge, voluntarily joined it." *U.S. v. White*, 569 F.2d 263, 267 (5th Cir.), *cert. denied*, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1978). "Proof of an agreement to enter into a conspiracy is not to be

lightly inferred." *White*, 569 F.2d at 267. We have now rejected the rule we formerly followed that once there is evidence establishing the existence of a conspiracy only slight evidence is necessary to connect a defendant with it, and we now follow the rule that there must be substantial evidence of that connection. *U.S. v. Malatesta*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979).

The *DeWeese* formulation is, of course, correctly directed toward whether there is evidence from which it can be inferred that an officer or crew member had knowledge of a conspiracy in progress on the vessel. But knowledge is not participation in the conspiracy. Without more, the three factors are not sufficient basis to permit an inference that persons on the vessel have joined in the conspiracy as participants. In this case the jury could, or course, infer that a conspiracy existed involving DeWeese, the radio spokesman, and the persons who unloaded the delivery vessel and loaded the Cowboy. But there is not sufficient evidence that any member of the Cowboy's crew joined in this conspiracy. I have attached as Appendix A a description of DeWeese's testimony in this case. He was the key witness for the government, and he testified during the case in chief. The defendants did not testify. No witness other than DeWeese gave testimony tending to show participation by the defendants in a conspiracy other than testimony describing the presence of the defendants on the Cowboy and the fact that none of them asserted innocence when the Coast Guard boarded.

In numerous vessel cases the courts have relied upon several kinds of evidence that, when added to the

DeWeese factors, carry presence and knowledge over the line to joining in the conspiracy:

—Evidence tending to show that before the voyage the defendants had agreements or conversation about going on a marijuana venture or had been on such a voyage before.

—Evidence that after the voyage began there were negotiations or agreements between defendant and co-conspirators concerning joining in the venture.

—Evidence that the vessel had as its known destination a usual source of marijuana.

—Evidence that a defendant received, or made a bargain for, drug transaction money.

—Evidence that a defendant helped to load the marijuana, to handle it once it was aboard the vessel, to clean up after loading, or to participate in unloading.

—Lack of fishing or shrimping gear.

—Maps and charts on which incriminating marks appeared.[1]

—Evidence that a defendant either set or selected a course for the vessel.

—Evidence that a defendant participated in evasive action, flight, throwing of marijuana overboard, or the like.

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[1]There were such charts in this case but no evidence connects any of the defendants with them by fingerprints, markings or by use of them in usual duties.

—Evidence that the vessel went into a port or mooring at which the defendant might have jumped ship.

De Weese, and now this case, make such additional evidence unnecessary.

Second, *De Weese* misreads our decision in *Alfrey*. Defendants Alfrey and Haight were crewmembers aboard a 70 foot trawler entering Tampa Bay and loaded with marijuana. During night hours the trawler engaged in a suspicious series of maneuvers and events involving two smaller boats, one of which was operating without lights and with its windshield covered. In reviewing sufficiency of the evidence we held:

> The jury could have reasonably concluded that appellants Alfrey and Haight sailed as crew members from Colombia, South America to their point of capture within Tampa Bay in a vessel laden with over 19,000 pounds of marijuana. That conclusion and the highly suspicious events of the night of the capture could logically lead the jury to conclude that Alfrey and Haight imported marijuana into the United States, possessed marijuana with intent to distribute it and conspired to commit these two substantive offenses.

620 F.2d at 555. Also we held:

> In this case the probable length of the voyage, inferable from the proximity of the border and the documentary evidence, the large quantity of marijuana on board, which made it

> undisputable that Alfrey and Haight had knowledge of the marijuana, and the necessarily close relationship between the captain of the trawler and his two man crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt. See *United States v. Christian*, 505 F.2d 94, 96 (5th Cir. 1974), finding such inference from a similar fact situation.

Id. at 556. Reading together the language quoted above from p. 555 and that from p. 556, it appears that the court held that the evidence permitted an inference that the conspiracy was operative in Colombia when the boat sailed from Colombia with defendants and marijuana aboard. The "three factors" discussed at 620 F.2d 556 are necessarily limited by the "beginning of the conspiracy" facts discussed at p. 555. Moreover, the *Alfrey* court appeared to be of the view that Alfrey and Haight were participants in the highly suspicious events that occurred on the night of capture. *DeWeese* disregarded these additional factors and only relied upon the three-factor language appearing at p. 556.

The evidence does not permit the jury to draw the inferences that *Alfrey*, at p. 555, held could be drawn in that case. For example, it does not support an inference that crewmembers of the Cowboy were participating in a conspiracy when the vessel departed Tarpon Springs. The jury could not infer that the crew even knew of a conspiracy at that time or even knew where the vessel was bound. All that the evidence showed as of the place and time of embarkation was that seamen, some of whom knew each other and knew the captain and some of whom had been on one previous voyage together

with the captain, left port in a shrimp boat rigged for shrimping and commanded by Captain DeWeese. The facts necessarily relied upon to permit an inference that the crew joined a conspiracy at a later time and place were facts about subsequent events—length of voyage, quantity of marijuana, and close association with the captain.

In n.1, as an alternative ground of decision, Judge Hill attempts to find factors in the present case that are analogous to those mentioned in *Alfrey* at p. 555. But his primary ground of decision is that the "three-factor test" drawn by *DeWeese* from p. 556 of *Alfrey* is enough.

Of course, as noted by Judge Hill, the jury could accept DeWeese's inculpatory testimony and reject his exculpatory testimony. The issue is whether the inculpatory testimony is sufficient to escape a motion for judgment of acquittal. But for the unfortunate language in *DeWeese* the inculpatory evidence would not be sufficient.

DeWeese had not been decided when this case was briefed and argued. It is not without significance that in brief and oral argument the government did not contend for the grudging reading of *Alfrey* that this court, a month and a half later, gave in *DeWeese*. Rather the government contended that the evidence was pushed over the line of sufficiency by the crew's usual performance of duty and their failure to mutiny, take to the lifeboats, or radio the Coast Guard. Thus, the evidence that the government urged made it possible for the case to be submitted to the jury was later held by this court to be not even necessary.

APPENDIX A

DeWeese is a resident of Marathon, Florida, in the Florida Keys, as are the four defendants. He is an experienced commercial fisherman and owns a commercial lobster and crab fishing boat. He had been shrimping 10 to 12 times, sometimes as captain and other times as crew. In March 1979 he served as captain of the Cowboy, a new 88-foot vessel, on a shrimping voyage on which the crew consisted of his son and defendants Millis, Keesling and Bennett. Before this March voyage DeWeese knew Millis and Bennett on sight. This voyage was discontinued when the Cowboy's radio transmission equipment failed. Between March and May 1979 the Cowboy made three or four shrimping voyages on which Keesling, Bennett and Freeman served as crew but with a different captain or captains.

Around May 1979 DeWeese was contacted by the owner of the Cowboy, who had arranged for him to take the vessel out in March, and asked if he wanted to take the boat out again. DeWeese agreed. DeWeese asked Millis, who had been on the March voyage, to be a member of the crew. The two of them flew together from Marathon to Tampa in the private airplane of a friend with whom they were able to get a ride. DeWeese and Millis went to Tarpon Springs, north of Tampa, where the Cowboy was docked. When they arrived the boat was already fueled and filled with ice and had aboard most of the groceries necessary for a two-week trip. Defendants Keesling, Bennett and Freeman were already on board from the Cowboy's last voyage (some may have been temporarily off getting groceries), and their belongings were on board.

It was agreed that Freeman would be the cook. Millis had served as captain on other vessels and could assist in navigating. Keesling was to act as engineer. The Cowboy was equipped with shrimp nets and with baskets for handling shrimp.

The Cowboy left Tarpon Springs on May 4 and headed toward the Dry Tortugas to go shrimping. On route to the Tortugas while standing the 4:00 a.m. to 8:00 a.m. watch, around 4:30—5:00 a.m., DeWeese was playing with the radio and received a call from another vessel that he had not heard of before, calling the Cowboy by name. After several calls he answered. The caller identified himself by name and asked if DeWeese was interested in making money, more than he could make shrimping. After thinking the matter over for a while DeWeese received a second call and replied affirmatively. He was instructed to travel 200 miles to the Rosario Banks, approximately 140 miles due west of the Cayman Islands, and there the Cowboy would be loaded with marijuana. DeWeese told the caller he was afraid to do this, and the caller replied that there was no danger because the Cowboy would not be going back to the United States with the cargo. Later DeWeese informed the caller by radio that the Cowboy was proceeding to the Rosario Banks.

The vessel headed for the Rosario Banks. About noon that day Freeman asked where they were going, and DeWeese told him they were not going shrimping but to get a load of marijuana. Freeman passed the word to other crewmembers and later in the day DeWeese talked to all of them. Millis and Freeman came to the wheelhouse and expressed concern, and DeWeese told them "that's where I was taking the boat." They "were

worried about the fact where the boat was going." DeWeese told them that they would not be going into American waters. Bennett and Keesling also expressed their concern.

It took two days to reach the Rosario Banks. During that time each crewmember took his watches. Freeman cooked and Keesling gave the engine such attention as it needed. After the vessel anchored at the Rosario Banks the same voice as before called on the radio and talked to DeWeese, who was alone on the bridge. DeWeese could not say whether the radio was loud enough for the crewmembers to overhear. The voice instructed DeWeese to travel to the Serrano Banks, some 200 miles away and off the coast of Nicaragua. DeWeese informed the crewmembers of this. Again they expressed concern. Freeman said "I've got a wife and children," and expressed concern that they might be stopped. DeWeese again explained that the boat would not be coming to the United States. Freeman was still concerned and said he did not think it was a good idea. Millis was "about the same mind" as Freeman. Freeman and Millis did most of the talking.

The vessel proceeded to the Serrano Banks and anchored for two days. A radio message was received that a vessel would rendezvous with it. When the other vessel arrived DeWeese and Millis threw a line to it and tied the two vessels together. A man boarded the Cowboy from the other vessel and identified himself as the radio spokesman. He and DeWeese met alone in the wheelhouse of the Cowboy. They negotiated an arrangement under which DeWeese would be paid $150,000 to deliver the load of marijuana to a point approximately 13 to 14 miles off the coast of Mexico.

DeWeese was instructed how to signal to two boats that would meet him and unload the marijuana.

Eight crewmembers from the other vessel loaded the Cowboy with bales of marijuana. They brought it aboard, put it in the hold, and stacked it. The defendants watched the loading operation. None of them handled the marijuana in any fashion. None cleaned up any debris left from the loading. DeWeese received no money. When loading was complete DeWeese and Millis covered the hatches with plastic bags. The Cowboy weighed anchor, departed, and entered the straits of Yucatan.

Throughout the voyage crewmembers brought up how they would be paid since they were not shrimping, but DeWeese refused to discuss money with them. DeWeese explained his command of and control over the crews as follows:—

Q Were they refusing any directions that you were giving them?

A Not refusing, no.

Q So when you told somebody to lay anchor, they would do that?

A Yes, sir.

Q — Weigh anchor?

A Yes, sir.

Q When you told somebody to stand watch, they would stand watch?

A Yes, sir.

Q Nobody said, "No, I don't want anything to do with this?"

A They better damn well have not said that.

Q Well, what would you have done, Mr. DeWeese? — With no gun?

[Objection made and overruled.]

A I would have ordered the man to his sleeping quarters to stay there.

Q (By Mr. Cowen) If all four of 'em had told you, "I don't want anything to do with this," then what would you have done?

A We would have set there on anchor 'til the boat rusted out, I suppose. It takes a crew to operate a boat, Mr. Cowen.

It takes at least two members plus the captain merely to operate the Cowboy while cruising and not fishing. The vessel was operated most of the time on automatic pilot. DeWeese made all changes in course. Throughout the voyage the crew performed their usual duties. Some helped put out the anchor, or weigh anchor, at the various places where the Cowboy went. When the Cowboy was anchored at Serrano Banks, Millis notified DeWeese that someone was on the radio. DeWeese and the crewmembers worked, slept and ate in close proximity to each other on the Cowboy. The defendants' sleeping quarters were immediately adjacent to those

of DeWeese. DeWeese would usually sleep four to six hours per day. He had no weapon on the vessel.

TUTTLE, Circuit Judge, concurring specially:

I concur in the result only. Like Chief Judge Godbold, I do so only because I am unable to distinguish this case from *DeWeese* as to the existence of the three factors found there to be sufficient to take such a case to the jury. We are, of course, bound by the *DeWeese* case as a binding precedent. It can be overruled only by an en banc decision of this Court.

Along the lines suggested by Chief Judge Godbold, I present a hypothetical case which I believe most Judges of this Court would say should not go to a jury. Suppose a shrimping boat captain enlisted from the docks of Tarpon Springs a young non-English speaking youth to go with him on a shrimping trip for 10 days; the crewman inspects the vessel and finds it fully equipped for the purpose, with nets, refrigeration, stores, etc. and he signs on. The vessel departs and unknown to the crewman it ends us at the Rosario Banks where it is loaded, without any help by him, with several tons of marijuana. The seaman now has no choice but to continue his crewman's duties, jump overboard or mutiny against a captain and crew of four older men, all of whom may be armed; his sleeping quarters are of necessity close to the others as are his other relations.

Such a crewman would have to choose to take the stand and testify to these facts and depend upon the jury to acquit him, or stand helpless once the government had made its proof of length of voyage, quantity of marijuana and closeness of relationship. By specifying

the three "factors from which the jury could reasonably find guilt beyond a reasonable doubt" this Court has placed almost an absolute burden upon a defendant to take the stand to prove the innocence of his presence on the boat.

It may be said that this is an extreme case, but from the record before us, it is not farfetched as compared with the facts dealing with the predicament of some of these appellants when they discovered that without any participation on their part, the captain had made his firm decision to engage in the marijuana hauling business.

Thus, I, too, express the belief that the Court should take this case en banc to review the decision in *DeWeese* and possible clarify *Alfrey*.

[FILED FEB 25 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-5074*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK WAYNE FREEMAN,
MOSES TAYLOR MILLIS,
KEITH ALLEN KEESLING
and CLIFFORD WAYNE BENNETT,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion NOVEMBER 12, 5 Cir., 1981, ____ F.2d ____).
( )

Before TUTTLE, GODBOLD and HILL, Circuit Judges.
PER CURIAM:

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

*Former Fifth Circuit Case: (Section 9(1) of Public Law 96-452—October 14, 1980).

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/_____
James C. Hill
United States Circuit Judge

UNITED STATES of America,
Plaintiff-Appellee.

v.

Thomas ALFREY, Davis Michael Haight
and Grover P. Kennedy,
Defendants-Appellants.

No. 79-5014

United States Court of Appeals,
Fifth Circuit.

July 3, 1980.

Three defendants were convicted in the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, District Judge, of importing marijuana, possessing marijuana with intent to distribute it, and conspiring to commit those offenses, and they appealed. The Court of Appeals, Simpson, Circuit Judge, in withdrawing its previous opinion, 612 F.2d 180, held that: (1) probable cause and exigent circumstances justified subsequent warrantless search of trawler within customs waters by customs officials; (2) evidence was sufficient to sustain all convictions of two of the defendants; (3) evidence was sufficient to sustain third defendant's conviction of possessing marijuana with intent to distribute it, but not his convictions of the other charges; and (4) under the concurrent sentence doctrine, Court of Appeals was not required to consider alleged error in admitting trawler's sailing permit, which was only substantial evidence of importation of the marijuana.

Reversed in part and affirmed in part.

Edward S. Campbell, III, Tampa, Fla. (court-appointed), for Alfrey.

Angelo M. Ferlita, Tampa, Fla. (court-appointed), for Haight.

Philip J. Padovano, Tallahassee, Fla., for Kennedy.

Gary J. Takacs, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

(Opinion February 20, 1980, 612 F.2d 180 (5th Cir. 1980))

Before SIMPSON, CHARLES CLARK, and FRANK M. JOHNSON, Jr., Circuit Judges.

SIMPSON, Circuit Judge:

The Court withdraws its opinion dated February 20, 1980, 612 F.2d 180, in its entirety and substitutes therefor the following:

A jury convicted appellants Alfrey, Haight and Kennedy of importing marijuana, possessing marijuana with intent to distribute it, and conspiring to commit these offenses in violation of 21 U.S.C. §§ 841, 846, 952, and 963, and 18 U.S.C. § 2. They were each sentenced to three concurrent four year sentences.

We consider on this appeal three challenges to the convictions. First, all appellants argue that the district judge erred by refusing to suppress the evidence gained

from the search of the vessel RUNNING BEAR. Second, Haight and Alfrey argue that the trial judge improperly admitted certain hearsay evidence under Rule 803(24) of the Federal Rules of Evidence. Third, all argue the evidence is insufficient to support the jury verdict. We find the search was valid; therefore its evidential fruits were properly admitted. Because we apply the concurrent sentence doctrine, it is unnecessary to consider whether the hearsay evidence was improperly admitted. Although the evidence is insufficient to support two of appellant Kennedy's convictions, importation of marijuana and conspiracy to possess and import marijuana, it is sufficient to support Kennedy's conviction for possession with intent to distribute and all convictions of appellants Haight and Alfrey.

FACTS

On May 22, 1978 at 3:00 P.M. United States Customs Patrol Officers Gehr, Tenbieg and Scott anchored the PELICAN, an unmarked thirty-six foot sport fishing type Customs vessel, off the southern tip of Egmont Key, an island lying in a north-south latitude off the mouth of Tampa Bay. The Customs officers were dressed as ordinary fishermen. Their anchorage afforded a clear view of the Southwest Passage, an entrance to Tampa Bay south of Egmont Key and the main shipping channel, an entrance to the Bay to the north. Although the PELICAN outwardly appeared an ordinary fishing vessel, it was equipped with radar, night vision goggles and binoculars. Its mission was to survey traffic entering or leaving Tampa Bay.

The weather was mild, the seas light and the moon full that night. From 3:00 P.M. until 9:00 P.M. only a

phosphate shipping vessel was seen in the main channel; no vessels were observed in the Southwest Passage. At 9:00 P.M. a thirty-five to forty foot speedboat departed the Southwest Passage. At 11:30 P.M. a twenty-five to thirty foot speedboat sped out the Southwest Passage. At approximately 1:00 A.M. a seventy foot North American trawler type vessel was sighted two to three miles offshore steaming toward the Southwest Passage. It was the first time that a trawler of this type had been seen in the area by any of the Customs officers. Unknown to them at that time, the trawler, later identified as the RUNNING BEAR, was laden with 19,094 pounds of marijuana. The vessel entered the Southwest Passage and proceeded up the main shipping channel toward the Sunshine Skyway bridge.

Ten minutes later a Wellcraft Nova entered the Southwest Passage. It was of the same size and configuration as the vessel observed speeding out the Southwest Passage at 11:30 P.M., but the officers were unable to positively identify it as the same vessel. The Nova did not have all its navigation lights on and appeared to be having engine trouble. It eventually overtook the trawler, approaching within ten to twenty feet. Shortly thereafter the PELICAN weighed anchor and began a moving surveillance as the trawler traveled up the main shipping channel. About 2:00 A.M. the trawler passed under the Sunshine Skyway bridge, which traverses Tampa Bay from north to south approximately ten miles inland.

Continuous visual contact was maintained with the trawler, but the Customs officers had previously lost sight of the Nova. However, minutes after passing under the bridge, a Wellcraft Nova of similar size and

configuration as the Nova observed earlier approached the PELICAN's stern and maneuvered alongside. Only a single operator was visible on board, but there was a small cuddy cabin aft large enough to conceal another person. The Nova was operating without lights and an object was tied around the windshield. [The Nova was captured later the next morning. The object tied around the windshield was a shirt covering the running light. The fuses to all the other lights had been removed.] The operator of the Nova asked why the PELICAN was running without lights; the Customs officers placed the same query to the Nova. Communication was difficult because of the engine noise. Suddenly the Nova cut sharply across the port bow of the PELICAN and proceeded directly to the trawler. One of the officers, aided by the night vision goggles, observed the Nova pull up close to the trawler. The Nova then proceeded up the channel for a short distance, made a large circle and fell in behind the PELICAN for ten to fifteen minutes.

Meanwhile the trawler continued northerly up the channel to marker 7F, then headed west for approximately 1000 yards before abruptly facing about and coming back toward the PELICAN. As the trawler passed officer Gehr brought the PELICAN about and came along the port side of the trawler. The officers observed that the vessel was heavily laden because her plimsoll line was not visible. After some small talk passed between the vessels, the Customs officers decided to board for a documents check. Officer Gehr piloted the PELICAN into position, identified himself and the others as Customs officers and informed the crew of the trawler of their intention to board. Chester Leon Curtis, later identified by the vessel's sailing permit as its captain, replied: "If

you're going to come aboard, come aboard." Record vol. IV at A-173. From his position on the flying bridge of the PELICAN officer Gehr observed someone attempting to hide on the starboard side of the trawler. Suddenly, a Magnum type speedboat, resembling the larger speedboat observed departing the Southwest Passage at 9:00 P.M., cut closely and sharply across the bows of the PELICAN and the trawler and sped away. It had three persons aboard. Almost simultaneously the Nova circled around the PELICAN and the trawler and hovered ten to fifteen feet off the starboard side of the trawler. Customs officers Scott and Tenbieg boarded the trawler after putting on their gun belts. As he walked to the stern officer Tenbieg observed the Nova speeding away. He asked the captain, Curtis, how many persons were on board and whether there were any weapons. The captain replied that three persons were on board and that they had no weapons. Officer Tenbieg instructed the captain to assemble everyone on the port side of the trawler. Only appellants Alfrey and Haight joined the captain there. The two officers then made a cursory inspection to determine whether there were any other persons on board; they found appellant Kennedy hiding on the starboard side of trawler. Kennedy was bare chested and dressed in street shoes and trousers.

Both officers noticed the smell of marijuana as they escorted Kennedy through the open wheelhouse; officer Scott decided to conduct a further investigation. Several burnt marijuana cigarettes were lying in plain view in the open wheelhouse and a small quantity of marijuana was lying on a table in the salon. Upon opening a small hatch he discovered that the trawler was loaded with bales of marijuana. All four persons

aboard, Curtis,[1] Alfrey, Haight and Kennedy were then arrested.

The ship's sailing permit was later discovered on board. It indicated that the RUNNING BEAR, commanded by Captain Curtis, had permission to sail from the port of Cartagena, Colombia on May 12, 1978 with a crew of three men and no passengers. The permit was signed by the port captain.

THE SEARCH AND SEIZURE

[1, 2] The district court denied appellant's motions to suppress the evidential fruits of the search. As counsel for appellant Kennedy concedes, the recent decision of this court in *United States vs. Whitaker*, 592 F.2d 826 (5th Cir. 1979), *rehearing en banc denied*, 601 F.2d 586, *cert. denied*, 444 U.S. 950, 100 S.Ct. 422, 62 L.Ed.2d 320, clearly holds that United States Customs officers have authority under 19 U.S.C. § 1581(a)[2] to stop and board vessels initially sighted in customs waters for document checks even in the absence of a modicum of

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[1] Although tried and convicted with the other three, Curtis was not sentenced until some time later, for reasons not appearing of record here. His appeal to this court, No. 79-5529, is presently pending.

[2] Title 19, section 1581(a) provides:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under [sections 1701 and 1703-1711 of this title], or any other authorized place, without as well as within his district, and examine the manifest

suspicion of probable cause. *See also United States v. Freeman*, 579 F.2d 942, 945 (5th Cir. 1978). This interpretation of § 1581(a) does not offend the Fourth Amendment. *Whitaker, supra*, 592 F.2d at 829. *Freeman, supra* 579 F.2d at 946. The trawler was initially sighted within customs waters;[3] therefore the Customs officers acted within their authority in stopping and boarding it. Once the officers were on board, the limited topside inspection, to ascertain whether all persons on board were accounted for, was a justified safety precaution. For these reasons the officers were properly in a position from which they had a "plain view" of the marijuana in the open wheelhouse and salon and of the strong smell of marijuana in the wheelhouse. See *Whitaker, supra*, 592 F.2d at 828-29; *Freeman, supra*, 579 F.2d at 947. The obvious presence of marijuana gave rise to probable cause which, combined with the exigent circumstances peculiar to a moving vessel justified the subsequent warrantless search. *Id.* Since probable cause is the highest standard of suspicion required by the Fourth Amendment we do not consider whether some lesser standard of suspicion would also justify a search under the circumstances of this case where a vessel is initially sighted in customs waters but is not stopped until after it has entered inland waters. Similarly, because exigent circumstances are present we do not decide

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(Footnote 2 Continued)

and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

[3] Customs waters are the waters from the coast to a point twelve miles offshore. 19 U.S.C. § 1401(j).

whether a warrant is required when exigent circumstances are not present. See, *Freeman, supra*, 579 F.2d at 948. *See United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) for an in depth discussion of the factors a court must consider in defining minimum Fourth Amendment standards in the search of vessels.

[3] The facts in *Whitaker* are indistinguishable from the facts of the instant case on any material ground; this panel is of course bound by prior panel decisions of the court. *Trunkline Gas Co. v FERC*, 608 F.2d 582 (5th Cir. 1979); *Puckett v. Commissioner*, 522 F.2d 1385 (5th Cir. 1975).

SUFFICIENCY OF THE EVIDENCE

At the conclusion of the government's case appellants moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court denied the motion. Appellants Alfrey and Kennedy challenge the denial claiming the evidence was insufficient to support the jury verdict.

[4, 5] In considering appellants' sufficiency of the evidence arguments we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Bright*, 550 F.2d 240, 242 (5th Cir. 1977). The test for sufficiency of the evidence is "whether, taking the view most favorable to the government, reasonable minds could conclude that the evidence is inconsistent with any [reasonable] hypothesis of the accused's innocence." *United States v. Suarez*, 608 F.2d 584, at 586 (5th Cir. 1979). *See also United States v. Moore*, 505 F.2d 620, 623 (5th Cir. 1974), *cert.*

denied, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975); *United States v. Edwards*, 488 F.2d 1154, 1157 (5th Cir. 1974). The jury could have reasonably concluded that appellants Alfrey and Haight sailed as crew members from Colombia, South America to their point of capture within Tampa Bay in a vessel laden with over 19,000 pounds of marijuana. That conclusion and the highly suspicious events of the night of the capture could logically lead the jury to conclude that Alfrey and Haight imported marijuana into the United States, possessed marijuana with intent to distribute it and conspired to commit these two substantive offenses.

Appellant Haight relies on decisions of this court holding that mere presence in an area where drugs are discovered is insufficient evidence to support a conviction for possession. *United States v. Rojas*, 537 F.2d 216 (5th Cir. 1976), *cert. denied* 429 U.S. 1061, 97 S.Ct. 785, 50 L.Ed.2d 777; *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974). These cases do not aid appellants because more than mere presence has been established in the instant case. In *United States v. Ferg, supra*, we held that evidence that the accused was a passenger in an automobile which had marijuana hidden in it was insufficient to support a criminal conviction. Clearly a member of a three man crew on a long ocean voyage in a small vessel packed with tons of marijuana is different from the passenger in *Ferg* or the person whose fingerprints were found on envelopes containing drugs in *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1973), or the person found crouched by a rock near a house containing marijuana in *United States v. Lopez-Ortiz*, 492 F.2d 109 (5th Cir. 1974). In this case the probable length of the voyage, inferable from the proximity of the border and the documentry evidence,

the large quantity of marijuana on board, which made it indisputable that Alfrey and Haight had knowledge of the marijuana, and the necessarily close relationship between the captain of the trawler and his two man crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt. *See United States v. Christian*, 505 F.2d 94, 96 (5th Cir. 1974), finding such an inference from a similar fact situation.

[6] Appellant Kennedy also urges the insufficiency of the evidence against him. He was found on board the trawler attempting to hide from the Customs officers and was dressed in street clothes. The late hour, his furtive behavior, his unexplained presence on board a vessel loaded with marijuana and the other suspicious circumstances of the evening were factors from which a jury could reasonably conclude that Kennedy was in possession of marijuana with intent to distribute it or at least that he was aiding and abetting the crew of the trawler in the commission of that crime. *See Id.* However, the evidence of importation and conspiracy was not sufficient to allow a reasonable juror to conclude that the inference of guilt was inconsistent with every reasonable hypothesis of innocence. *E. g., United States v. Ferg, supra*, 504 F.2d at 917; *Montoya v. United States*, 402 F.2d 847, 850 (5th Cir. 1968). Considering Kennedy's dress and behavior and the presence and activity of the smaller boats, a reasonable and likely inference is that Kennedy boarded the trawler after it entered the United States and after the crime of importation of marijuana was committed. Kennedy likely became involved shortly before he was arrested; therefore a juror could not find, by the reasonable doubt standard, that Kennedy knew of the existence of the conspiracy and with that knowledge intentionally joined it. *E. g.*

United States v. Bright, supra, 550 F.2d at 242; *United States v. Barrera*, 547 F.2d 1250, 1256 (5th Cir. 1977). His conspiracy and importation convictions must be reversed.

THE CONCURRENT SENTENCE DOCTRINE

At trial the only substantial evidence of importation was the trawler's sailing permit discovered on board. The permit indicated that the trawler RUNNING BEAR, with a crew of three, had permission to sail from the port of Cartagena, Colombia, on May 12, 1978. It was signed by the port captain. The district court admitted the permit under Rule 803(24) of the Federal Rules of Evidence, the residual exception to the hearsay rule. Appellants Haight and Alfrey argue that the document was improperly admitted because counsel for the government failed to comply with the notice requirements of the rule. It is questionable whether the notice requirements of the Rule 803(24) have been met, but we do not reach this difficult issue because of the concurrent sentence doctrine.

[7-9] Appellants were all sentenced to four years on each of the three counts of the indictment; the sentences are to be served concurrently. Under the concurrent sentence doctrine it is not necessary to consider errors concerning a conviction for which the appellant has a sentence concurrent with the sentence of an affirmed conviction where there is no substantial possibility that the unreviewed conviction will adversely affect future parole. *United States v. Vasquez-Vasquez*, 609 F.2d 234, at 235 (5th Cir. 1980); *United States v. Rubin*, 591 F.2d 278 (5th Cir. 1979). Exclusion of the document would not require reversal of the possession

with intent to distribute conviction because of the other overwhelming evidence of guilt. The Parole Commission gives the same weight to a reversed conviction as to an affirmed conviction when the reversal is not based on grounds related to guilt or innocence. *United States v. Vasquez-Vasquez, supra,* 609 F.2d at 235 n. 2; *United States v. Rubin, supra,* 591 F.2d at 281; United States Parole Commission Research Unit, *Guideline Application Manual,* at 4.08 (Nov. 1977 No. 16) (Adopted by the Commission as Appendix 4, U.S. Parole Commission Procedure Manual, May 1, 1978). Therefore a reversal based on improper admission of the sailing permit would not likely affect appellants' chances for future parole inasmuch as an improper denial of a motion to suppress reliable evidence is a ground unrelated to guilt or innocence. *United States v. Vasquez-Vasquez, supra,* 609 F.2d 235 n. 2. Accordingly we need not consider the alleged error in admitting the sailing permit under Rule 803(24) of the Federal Rules of Evidence.

In summary, we reverse appellant Kennedy's importation and conspiracy convictions because we find the evidence insufficient to support a criminal conviction on those charges. In all other respects the district court judgment is correct and is affirmed.

REVERSED IN PART and AFFIRMED IN PART.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jay Hilery DeWEESE,
Defendant-Appellant.

No. 79-5575.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1980.

Defendant was convicted in the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., of conspiracy to import marijuana, and defendant appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) ice hold of shrimp boat was not area in which captain of the boat could have had legitimate expectation of privacy, and thus search of the ice hold did not infringe interests which Fourth Amendment was designed to protect; (2) district court was not deprived of jurisdiction over prosecution for conspiracy to import narcotics on alleged basis that there was no evidence establishing that either agreement to conspire or overt act in furtherance of conspiracy was committed within United States; (3) evidence was sufficient to establish that defendant, who was apprehended in shrimp boat on high seas, intended to import marijuana into United States, and (4) absent showing of prejudice, defendant was not entitled to reversal of conviction due to claimed violation by Government of its discovery obligations in failing to

inform defendant until day before trial that specific expert witness would be testifying.

Affirmed.

Milton E. Grusmark, Miami, Fla., for defendant-appellant.

Stephen S. Cowen, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, HILL and FAY, Circuit Judges.

JAMES C. HILL, Circuit Judge:

At dawn on May 14, 1979 the "Cowboy," a large shrimping vessel, was stopped by a Coast Guard cutter in the Straits of Yucatan. Approximately 41,000 pounds of marijuana were discovered in the vessel's ice hold. This case is an appeal by the captain of the "Cowboy," Jay Hilery DeWeese, from a jury conviction for conspiracy to import marijuana into the United States. 21 U.S.C. §§ 952(a) and 963.

DeWeese's arguments fall into four categories. First, he contends that violations of the fourth amendment require that the marijuana be suppressed. Second, he argues that the district court lacks jurisdiction when the evidence fails to show that either the agreement to conspire or an overt act in furtherance thereof is committed in the United States. Third, he asserts that the evidence is insufficient to establish that he intended

to import marijuana into the United States. Fourth, he maintains that the government violated Fed.R.Crim.P. 16 and the omnibus order in this case by failing to identify a witness, and provide a copy of the chart prepared by that witness, in a timely fashion. For the reasons set out below, we affirm.

I. *Encounter in The Yucatan Straits*

On the morning of May 14, 1979 the Coast Guard cutter "Point Lobos" was on patrol near the Straits of Yucatan some 250 miles from the United States. It observed an unidentified vessel on its radar approximately nine miles away. Upon closer investigation the vessel was identified as a large shrimp boat with the name "Cowboy" and the home port of "Mobile" painted on her stern.

When first sighted, the "Cowboy" was on a heading of 290 to 300 degrees, or northwest, at nine knots per hour. As the "Point Lobos" closed to within three miles, the "Cowboy" changed course to a heading of 340 degrees, or north-northwest. At a distance of approximately twenty-five yards the "Point Lobos" requested over its loudspeaker that the "Cowboy" stop for a boarding.

Petty Officer Helms led a three man boarding party onto the "Cowboy." The appellant identified himself as the captain. Mr. Helms told him that he was checking the "Cowboy" for compliance with United States laws. Record, Vol. IV, at B-12-13.

In response to Mr. Helms request DeWeese produced documentation papers which identified the "Cowboy" as an American flagship. No permits were produced

which would allow the "Cowboy" to shrimp in foreign waters. An inspection of the vessel revealed one minor safety violation and the absence of a required oil pollution placard.

During the inspection both Mr. Helms and Coast Guardsman Gayle observed that the vessel was extremely clean. The rigging for the shrimp nets appeared unused. In addition, the metal strips on the boards used for dragging the nets on the ocean floor were rusty. This suggested the boards had not been used recently as the metal strips would have been shiny from contact with the ocean floor.

After inspecting the "Cowboy's" engine room, Mr. Helms asked DeWeese if he could look in the vessel's ice hold where the catch is generally stored. DeWeese responded, "Sure, but you're not going to like what you find." (Record, Vol IV, at B-17). DeWeese and another crewmember proceeded to lift the hatch to the ice hold. A large number of marijuana bales could be seen from the deck. DeWeese and his four crewmembers were placed under arrest. Five-hundred and three bales of marijuana weighing over 41,000 pounds with a value of approximately $8,000,000 were seized.

DeWeese and the four crewmembers were indicted for conspiracy with each other and others unknown for a twofold purpose: importation and possession with intent to distribute. The trial of the crewmembers was severed. The charge of conspiracy to possess with intent to distribute was struck from the indictment. DeWeese was convicted by a jury on the charge of conspiracy to import. He appeals.

II. *Search and Seizure on the High Seas*

[1] Appellant first argues that 14 U.S.C. § 89(a) is unconstitutional because it allows the Coast Guard to stop and board a vessel on the high seas without probable cause or reasonable suspicion. The fourth amendment prohibits only those searches and seizures that are unreasonable. This Circuit has found the Coast Guard's § 89(a) plenary authority to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and narcotics violations to be reasonable within the meaning of the fourth amendment. *United States v. Williams*, 617 F.2d 1063, 1075-78 (5th Cir. 1980) (en banc); *United States v. Erwin*, 602 F.2d 1183, 84 (5th Cir. 1979) (per curiam); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc). Such searches may be conducted "in the complete absence of suspicion of criminal activity." *Williams* at 1075.

Appellant's next contention leads us into less certain waters. Appellant asserts that even if we assume the Coast Guard correctly stopped and boarded the "Cowboy," Helms subsequent search of the ice hold was conducted without probable cause and is therefore violative of the fourth amendment.

Our inquiry properly begins with a determination of whether the disputed search has infringed an interest of the appellant which the fourth amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 428, 58 L.Ed.2d 387 (1978). Specifically, we must decide whether or not DeWeese has a "legitimate expectation of privacy" in the ice hold of a large shrimping

vessel. *See Rawlings v. Kentucky*, ____ U.S. ____, 100 S.Ct. 2256, 2261, 65 L.Ed.2d 633 (1980).

Our most recent en banc encounter with search and seizure at sea embraces this initial inquiry required by *Rakas*. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc). In *Williams* we held:

> We have concluded that "reasonable suspicion" is the appropriate fourth amendment standard by which to judge section 89(a) searches of the "private" areas—if there can be such areas—of the holds of vessels in international waters conducted for the purpose of discovering contraband or evidence of criminal activity.

617 F.2d at 1088.

In *Williams* we assumed that the defendant had a reasonable expectation of privacy in the hold, thereby avoiding the issue of what is necessary to constitute a privacy interest in the hold of a merchant vessel. *Id.*, at 1084-85. We cannot, and should not, avoid that issue here.

[2] It has been established that the fourth amendment's protection is not to be measured exclusively by the laws defining property rights, trespass, and the like. *Rawlings v. Kentucky*, ____ U.S. ____, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S., at 149-150, n.17, 99 S.Ct., at 434 n.17 (1978). One may have a protected expectation of privacy in the absence of property interest. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d

1688 (1960). On the other hand, one may have fee simple title to property upon which he has no expectation of privacy. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). *See Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). For example, the owner of a mercantile establishment gives up any legitimate expectation of privacy as to goods and wares in his glass enclosed shop window.

Upon and within enclosed real or other property, expectation of privacy may vary from area to area. The outer walls of a single family residence will usually be coextensive with privacy therein. In a condominium building, all legitimately inside the building have free access to the common areas; an owner's expectation of privacy, vis-a-vis others properly inside, would normally be limited to the owner's private living quarters.

Within a property where some of the enclosed area is private to the individual and the rest freely accessible, there may yet remain an expectation of privacy as to persons not entitled to be upon the property at all. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314-15, 98 S.Ct. 1816, 1821-22, 56 L.Ed.2d 305 (1978). Nevertheless, in an area to which access is freely given to all properly and lawfully within the close, it is apparent that, as to them, a reasonable expectation of privacy does not exist in the common area. *Cf. United States v. Dionisio*, 410 U.S. 1, 13-16, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973) (the fourth amendment does not protect what "a person knowingly exposes to the public, even in his own home or office . . . .")

[3-5] Of those legitimately aboard the "Cowboy" on the morning of May 14, 1979 was Petty Officer

Helms. 14 U.S.C. § 89(a). *United States v. Williams*, 617 F.2d 1063, 1075-78 (5th Cir. 1980) (en banc); *United States v. Erwin*, 602 F.2d 1183, 1184 (5th Cir. 1979) (per curiam); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc). Though not pertinent to our task today, there may well have been enclosures to which Captain DeWeese and other individuals lawfully aboard retained a legitimate expectation of privacy. A crewman's foot locker, duffle bag, private cabin or quarters may well have been accessible to only that one individual and not others. The ice hold into which each would be expected to go (or, at least, to peer) was not such an area.[1] There can be no legitimate expectation of privacy in those areas of a commercial vessel which are subject to the common access of those legitimately aboard the vessel. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 466-468, 91 S.Ct. 2022, 2038-2039, 29 L.Ed.2d 564 (1971).

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[1]Two alternative grounds for upholding the district court's refusal to suppress the marijuana exist. First, we find that the Coast Guard had reasonable suspicion to search the hold for a narcotics violation. Based on their experience, the boarding party could have concluded that the location of the "Cowboy" coupled with the total absence of fishing activity created a "reasonable suspicion" that the "Cowboy" was on a narcotics run. Second, when Mr. Helms asked DeWeese if he could look in the ice hold DeWeese responded, "Sure, but you're not going to like what you find." Considering the circumstances as a whole we find that DeWeese's response constitutes voluntary consent to search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). However, these two grounds concern the "reasonableness" of the search. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) mandates that we begin our analysis with the inquiry of whether or not the search infringes on any interest of the defendant which the fourth amendment was designed to protect. As we have concluded that the search in question did not so infringe upon DeWeese, it is unnecessary to reach the "reasonableness" of the search.

III. *Extraterritorial Jurisdiction and Sufficiency of the Evidence*

[6] Appellant also alleges that the district court lacked jurisdiction over this case because there was no evidence to es blish that either the agreement to conspire or an overt act in furtherance of the conspiracy was committed within the United States. This issue has been decided adversely to the appellant. *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980). As regards 21 U.S.C. § 963, *Ricardo* held that "[t]he fact that appellants intended the conspiracy to be consummated within the territorial boundaries satisfies jurisdictional requisites." *Id.*, at 1129. *See United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (Congress intended the crime of attempting to import a controlled substance into the United States, 21 U.S.C. §§ 952(a) and 963, to reach exclusively extra-territorial conduct.)

[7] Appellant next attacks the verdict on the ground that the evidence was insufficient to establish that he intended to import the marijuana into the United States. In considering appellant's sufficiency of the evidence arguments we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942). The test for sufficiency of the evidence is whether reasonable minds could conclude that the evidence is inconsistent with any reasonable hypothesis of the accused's innocence. *United States v. Henderson*, 588 F.2d 157 (5th Cir. 1979).

At trial only one witness addressed the issue of whether DeWeese intended to import the marijuana aboard the "Cowboy" into the United States. Commander

Howard Gehring, who was qualified as an expert in navigation and oceanography, concluded that the "Cowboy" was "en route to a United States port." Record, Vol. IV, at B-142. Gehring's opinion was based on the assumption that a prudent mariner would take advantage of ocean currents, weather, bottom topography, and tides. *Id.*, at 111. The "Cowboy" had maintained two headings: 290 to 300 degrees, or northwest, and 340 degrees, or north-northwest. Gehring found that a vessel maintaining such headings in the Straits of Yucatan was positioned to take advantage of currents which would carry it north to the United States. The "Cowboy's" headings would not have favored a destination of Mexico, Cuba, or the Bahamas. *Id.*, at 130.

Gehring also analyzed the navigational charts discovered aboard the "Cowboy." He concluded that only the charts for Mobile Bay, Alabama and the west coast of Florida, primarily Tampa Bay and Tarpon Springs, provided sufficient detail for a safe entry into port. It was noted that the only tidal tables on board the "Cowboy" were for Tarpon Springs. Gehring stated that the absence of detailed charts for Mexico, Cuba, the Bahamas, or anywhere outside of Mobile and west coast of Florida, would have prevented the "Cowboy" from safely entering foreign ports.

Based on Commander Gehring's testimony we find that a reasonable jury could have concluded beyond a reasonable doubt that the "Cowboy's" destination was an American port.

[8] We also note that the evidence is sufficient to find that DeWeese was engaged in a conspiracy to import. *United States v. Alfrey*, 620 F.2d 551 (5th Cir.

1980). In *Alfrey* we concluded that the probable length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship between the captain and his crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt. *Id.*, at 556. See *United States v. Christian*, 505 F.2d 94, 96 (5th Cir. 1974). The comparable facts in the present case are no less compelling. We find particularly persuasive the government's argument that it is illogical to believe that one person would attempt to smuggle eight million dollars of marijuana from Colombia to the United States without pre-arranged assistance.

IV. *Defendant's Discovery*

[9] Appellant contends that two defects in the discovery process require reversal. On August 14, 1979, the day before trial, the government provided defense counsel with a chart prepared by Commander Gehring. The chart was a "visual display of Commander Gehring's explanation of his expert opinion." Appellee's Brief, at 27. Among other things, the chart depicted the ocean currents in the Gulf of Mexico. "With minor modifications," the chart became Exhibit 27 and was used by Commander Gehring when he testified.

Appellant argues that this chart was a "report" within the meaning of Fed.R.Crim.P. 16(a)(1)(D). A month prior to trial on July 13, 1979 the defendant had requested all reports and examinations prepared by government experts. Appellant asserts that the government's failure to provide the report earlier constitutes a "flagrant" violation of his discovery request. He further urges that prejudice resulted because it was impossible to

become familiar with the chart overnight without a background in oceanography.

The government responds that Commander Gehring's chart cannot properly be considered the report of a physical or mental examination or of a scientific test or experiment. Fed.R.Crim.P. (16)(a)(1)(D). Our disposition of the issue does not require us to reach the government's contention. In the Fifth Circuit a failure to comply with Rule 16(a) is not reversible in the absence of a showing of prejudice. *United States v. Pascual*, 606 F.2d 561, 565 (5th Cir. 1979); *United States v. Arcentales*, 532 F.2d 1046, 1050 (5th Cir. 1976). The record in this case reveals no such prejudice. A broad assertion that DeWeese's counsel lacked adequate time for study of the chart does not constitute prejudice sufficient to require reversal.

[10] Appellant next argues that the government violated the court's omnibus order. Under this order both parties were to exchange witness lists by July 20, 1979. On the day before trial, August 14, 1979, the government informed the appellant that Commander Gehring would be testifying. As a result, appellant complains that he was unable to properly prepare for the cross-examination of Commander Gehring. Appellant urges that there was no excuse for his not being informed about this crucial witness as the government "obviously knew of Commander Gehring's existence long before the day of trial." Appellant's Brief, at 37.

We can find no excuse for the government's failing to inform the appellant in a timely fashion that Caption Gehring would testify. Certainly his testimony is a crucial part of the government's case. We agree that it

is inconceivable that the government learned of the Commander one day before trial.

To warrant reversal, however, the appellant must make a showing of prejudice. *United States v. Phillips*, 585 F.2d 745, 747 (5th Cir. 1978). He has failed to do so. Thus, although we strongly condemn the failure of the government to abide by its obligations under the omnibus proceeding, we cannot reverse appellant's conviction absent a showing of prejudice.

Finally, appellant argues that the "Cowboy" was depicted prejudicially on Commander Gehring's chart. We find this argument to be frivolous.

V. *Conclusion*

In conclusion, we hold that the case was proved and the conviction is

AFFIRMED.

Opposition

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No. 81-1978

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK WAYNE FREEMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there was insufficient evidence to support their convictions.

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiring to import marijuana into the United States, in violation of 21 U.S.C. 952(a) and 963. Petitioners Freeman and Millis were each sentenced to four years' imprisonment and a special parole term of seven years.[1] Petitioners Keesling and Bennett were sentenced

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[1]Petitioners Freeman and Millis have not challenged their special parole terms. However, in *Bifulco* v. *United States*, 447 U.S. 381 (1980), this Court held that a special parole term may not be imposed as part of a sentence for conspiracy to violate the controlled substances laws. Petitioners may move for correction of their sentences in the district court.

under provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed (Pet. App. 2-33; 660 F. 2d 1030).

The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 4-9), showed that on May 14, 1979, officers from the Coast Guard Cutter POINT LOBOS, on patrol in the Yucatan Straits, boarded a vessel with the name COWBOY and the home port of "Mobile" painted on the stern. Co-defendant Jay Hilery DeWeese[2] identified himself as the captain; petitioners constituted the crew of the vessel.

Although the COWBOY was a large shrimp boat, the boarding officers noticed that the vessel's shrimp nets were not in the water and were not attached to extension booms. In addition, the boat was very clean and the metal strips on the boards used for dragging the nets were rusty, which indicated that no shrimping had occurred because recent dragging along the ocean bottom would have polished the strips. A subsequent search of the vessel in port revealed that the COWBOY carried no shrimp and that the ice on board was insufficient to preserve a shrimping catch.

After inspecting the vessel's documents and engine room, the chief boarding officer asked co-defendant DeWeese if he could take a look in the ice hold. DeWeese responded, "Sure, but you're not going to like what you find." When DeWeese and petitioner Keesling opened the hatch the boarding officer saw bales of what he believed to be marijuana and smelled the odor of marijuana. Petitioners and DeWeese were then placed under arrest.

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[2]Co-defendant DeWeese was tried separately and convicted, and his conviction was affirmed on appeal. *United States* v. *DeWeese*, 632 F. 2d 1267 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981).

The ice hold was searched and found to contain 503 bales of marijuana weighing 41,750 pounds. The wholesale value of the marijuana was approximately $8,000,000.

At petitioners' trial DeWeese testified for the government pursuant to a court order and a grant of immunity. DeWeese testified that petitioners were crew members of the COWBOY and that no one had planned to transport marijuana when the voyage began. However, during an early morning watch DeWeese received a mysterious radio message from an unknown vessel asking if he wanted to make some money. DeWeese responded affirmatively and the mysterious caller indicated that he should travel to a point 200 miles away, where he would take on a load of marijuana which he was to deliver to an unspecified location not in the United States. Petitioners allegedly expressed concern at this turn of events, but DeWeese reassured them by representing that they would not be entering United States waters with the marijuana. Eventually, in the vicinity of the Serrano Banks off the coast of Nicaragua, the COWBOY was loaded with marijuana and DeWeese was directed to deliver the cargo to a point approximately 13 to 14 miles off the Mexican coast. DeWeese claimed to be following these directions until the COWBOY was stopped by the POINT LOBOS in the Yucatan Straits.

DeWeese further testified that he was an experienced navigator. Although he conceded that a chart of an island near the Serrano Banks was on board the COWBOY, he claimed that he had not intended to travel to that area when he first set sail from Florida. DeWeese also stated that he had never discussed pay with petitioners, although crew members on a shrimping cruise are usually paid a share of the catch. In addition, DeWeese stated that even though he was unarmed, none of petitioners ever refused his orders or ceased performing his assigned tasks as part of the crew.

DeWeese admitted that without the crew's cooperation the voyage of the COWBOY would have been impossible.

Other government witnesses testified that importing marijuana into Mexico, a country which exports large quantities of marijuana to the United States, was unheard of, and that the COWBOY's position, headings and charts indicated a United States destination.

2. Petitioners contend that the government presented insufficient evidence to show that they conspired to import marijuana into the United States. This Court refused to review an identical contention raised by co-defendant DeWeese (*DeWeese* v. *United States*, cert. denied, 454 U.S. 878 (1981), and there is no reason for a different result here.[3]

The evidence demonstrated that at the time of the Coast Guard boarding petitioners and DeWeese had been at sea for at least 10 days, yet the COWBOY's shrimping nets and equipment appeared to be unused and there were no shrimp on board. Moreover, a search of the hold uncovered a large quantity (41,750 pounds) of marijuana. These factors, coupled with the "close relationship between captain and crew inferable from the length of the voyage and the size of the vessel" (Pet. App. 13), clearly established that petitioners and DeWeese had conspired to import the marijuana. See *United States* v. *DeWeese*, 632 F. 2d 1267, 1272 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); *United States* v. *Alfrey*, 620 F. 2d 551, 556 (5th Cir.), cert. denied, 449 U.S. 938 (1980); *United States* v. *Laughman*, 618 F. 2d

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[3]Petitioners' contention that this Court should grant review to resolve a conflict between the decision below and earlier decisions of the Fifth Circuit is without merit. The Fifth Circuit denied the petition for rehearing en banc in this case (Pet. App. 34-35), and this Court does not sit to resolve alleged conflicts within a single circuit. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

1067, 1074-1075 (4th Cir. 1980); *United States* v. *Gomez*, 529 F. 2d 412, 418-419 (5th Cir. 1976). In addition, as the court of appeals noted (Pet. App. 14), DeWeese's testimony confirmed that petitioners were aware of the presence of marijuana on board and also that petitioners, as crew members, had a close relationship with DeWeese.[4]

Moreover, in *United States* v. *DeWeese, supra*, 632 F. 2d at 1272, the court of appeals pointed out that "it is illogical to believe that one person would attempt to smuggle eight million dollars of marijuana from Colombia to the United States without pre-arranged assistance." This observation is equally applicable in this case, which is based on the same facts as *DeWeese*. The fact that a chart of the Serrano Bank area—where the marijuana was loaded onto the vessel—was found on board further supports the reasonable inference that DeWeese would not have placed a valuable cargo of contraband in the hands of a crew whose loyalty he had not ascertained.[5] Thus, it was perfectly reasonable for the jury to conclude that petitioners were brought into the conspiracy before the COWBOY set sail.[6]

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[4]The court of appeals correctly observed (Pet. App. 13-14) that "the jury was entitled to consider DeWeese's inculpatory statements about the crew even though they rejected his exculpatory statements on their behalf."

[5]DeWeese, who was unarmed and outnumbered four to one, could not have hoped to coerce the crew in the event they proved recalcitrant.

[6]That the jury could have reached such a conclusion here does not, of course, mean that a similar conclusion must be reached in all cases where the three factors adverted to by the court of appeals (*viz.*, length of voyage, large quantity of marijuana on board and close relationship between captain and crew) are present. Thus, contrary to the statement of Judge Tuttle, concurring specially below, it is not true that the court of appeals' decision "has placed almost an absolute burden upon a defendant to take the stand to prove the innocence of his presence on a boat" (Pet. App. 33). Whenever a persuasive case has been presented against a defendant and he may possess exculpatory information, there

In sum, the court of appeals found that, when viewed in the light most favorable to the government, the evidence was sufficient to support petitioners' convictions. There is no need for this Court to review that fact-bound ruling.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1982

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is considerable pressure on him to testify, but this is hardly a novel or unconstitutional occurrence. As the court below concluded (Pet. App. 15 n.1), "[t]he constitution does not prohibit conviction merely because the only hope of avoiding it may be the defendant's testimony."